



This document is scheduled to be published in the Federal Register on 09/30/2013 and available online at <http://federalregister.gov/a/2013-23764>, and on [FDsys.gov](http://FDsys.gov)

(Billing Code 5001-06-P)

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 216 and 252**

**RIN 0750-AI04**

**Defense Federal Acquisition Regulation Supplement: Allowability of Legal Costs for Whistleblower Proceedings (DFARS Case 2013-D022)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Interim rule.

**SUMMARY:** DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2013 that amends the allowability of legal costs incurred by a contractor related to whistleblower proceedings.

**DATES:** Effective date: [Insert date of publication in the **FEDERAL REGISTER.**]

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before [Insert date 60 days after date of publication in the **FEDERAL REGISTER**], to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2013-D022, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D022" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D022." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D022" on your attached document.
- o E-mail: [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2013-D022 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov), approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6106; facsimile 571-372-6094.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

This interim rule revises DFARS subparts 216.3 and adds a new clause at 252.216 to implement paragraphs (g) and (i) of section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239).

### **II. Discussion and Analysis**

The National Defense Authorization Act (NDAA) for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013) established enhanced whistleblower protections for contractor and subcontractor employees in separate, but parallel, sections of the NDAA for titles 10 and 41 agencies, respectively. Title 10 agencies are required by the terms of section 827 (i)(2) to revise their respective FAR supplements. These enhanced whistleblower protections and the associated cost principle changes are being implemented by two DFARS cases (for DoD only) and two FAR cases (for title 41 agencies), which are independent, but parallel, rulemakings because of some minor differences in the operations of the underlying statutes and because the title 41 statute is only a four-year pilot program.

Paragraph 827(g) addresses the allowability of legal costs incurred by a contractor related to whistleblower proceedings.

Paragraph 827(i)(1) specifies that the amendments made by section 827 are applicable to—

- Contracts awarded on or after the effective date;
- Task orders entered into on or after the effective date, pursuant to contracts awarded before, on, or after such date; and
- Contracts awarded before the effective date, which are modified to include a contract clause providing for the applicability of such amendments.

Paragraph 827(i)(3) requires that at the time of any major modification to a contract that was awarded before the effective date, the head of the contracting agency shall make best efforts to include in the contract a clause providing for the applicability to the contract of the amendments made by section 827.

DoD has added a new clause at DFARS 252.216-7009, Allowability of Legal Costs Incurred in Connection With a Whistleblower Proceeding, as prescribed at DFARS 216.307(a). This clause is necessary to make the revised whistleblower cost principle applicable to any task orders issued against contracts awarded prior to the effective date of this regulation and any contracts modified to implement section 827. Otherwise, unless the terms of the contract state otherwise, FAR clause 52.216-7, Allowable Cost and Payment, states in paragraph (a) that costs are determined to be allowable in accordance with FAR subpart 31.2 in effect on the date of the contract award.

DFARS Case 2013-D010 will address the paragraphs of section 827 that provide enhancements of whistleblower protections for contractor employees, including revisions to 10 U.S.C. 2409.

### **III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### **IV. Regulatory Flexibility Act**

DoD does not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities are awarded on a competitive fixed-price basis, and do not require application of the cost principles contained in this rule.

However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The reason for the action is to implement paragraphs 827(g) and (i) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239). Section 827(g) expands the cost principle at 10 U.S.C. 2324(k) to apply the cost principle on allowability of costs related to legal and other proceedings to costs incurred by contractors in proceedings commenced by a contractor employee submitting a complaint under 10 U.S.C. 2409 (whistleblowing), and include as specifically unallowable, legal costs of a proceeding that results in an order to take corrective action under 10 U.S.C. 2409. The legal basis for the rule is 10 U.S.C. 2324(k).

Most contracts awarded on a fixed-price competitive basis do not require application of the cost principles. The majority of contracts valued at or below the simplified acquisition threshold are awarded on a fixed price competitive basis. Requiring submission of certified cost or pricing data for acquisitions that do not exceed the simplified acquisition threshold is prohibited (FAR 15.403-4(a)(2)). According to the Federal Procurement Data System data for Fiscal Year (FY) 2012, there were 48,115 new DoD contract awards over the simplified acquisition threshold in FY 2012. Of those contracts, only 6,760 awards were to small businesses on other than a

competitive fixed-price basis. Estimating 3 awards per small business, that could involve about 2,600 small businesses. However, this rule would only affect a contractor if a contractor employee commenced a proceeding by submitting a complaint under 10 U.S.C. 2409, and if that proceeding resulted in imposition of a monetary penalty or an order to take corrective action under 10 U.S.C. 2409. We do not have data on the percentage of contracts that involve submission of a whistleblower complaint and result in monetary penalty or an order to take corrective action.

There are no projected reporting, recordkeeping, or other compliance requirements of this rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules. DoD was unable to identify any alternatives to the rule that would reduce the impact on small entities and still meet the requirements of the statute.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D022), in correspondence.

## **V. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of

Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

## **VI. Determination to Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. By operation of law, the new statute for the whistleblower protection became effective on July 1, 2013, i.e., Congress included language in section 827(i) specifically addressing the effective date of the revisions to 10 U.S.C. 2409 and 10 U.S.C. 2324. Section 827(g), which is implemented through this rulemaking, addresses the contractor's legal fees arising from an employee's complaint of reprisal and makes these fees expressly unallowable costs when there is contractor culpability. The most effective and efficient way to ensure awareness and compliance by the DoD and its contractors with section 827(g) is through the issuance of an interim rule. This regulation requires nothing beyond that which is set forth clearly in the statute. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

## **List of Subjects in 48 CFR Parts 216 and 252**

Government procurement.



**Manuel Quinones,**

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 216 and 252 are amended as follows:

1. The authority citation for 48 CFR parts 216 and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR Chapter 1.

**PART 216—TYPES OF CONTRACTS**

2. Add section 216.307 to subpart 216.3 to read as follows:

**216.307 Contract clauses.**

(a) As required by section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), use the clause at 252.216-7009, Allowability of Costs Incurred in Connection With a Whistleblower Proceeding—

(1) In task orders entered pursuant to contracts awarded before September 30, 2013, that include the clause at FAR 52.216-7, Allowable Cost and Payment; and

(2) In contracts awarded before September 30, 2013, that—

(i) Include the clause at FAR 52.216-7, Allowable Cost and Payment; and

(ii) Are modified to include the clause at DFARS 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, dated September 2013 or later.

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

3. Add section 252.216-7009 to read as follows:

**252.216-7009, Allowability of legal costs incurred in connection with a whistleblower proceeding.**

As prescribed in 216.307(a), use the following clause:

**ALLOWABILITY OF LEGAL COSTS INCURRED IN CONNECTION WITH A  
WHISTLEBLOWER PROCEEDING (SEP 2013)**

Pursuant to section 827 of the National Defense Authorization Act for Fiscal year 2013 (Pub. L. 112-239), notwithstanding FAR clause 52.216-7, Allowable Cost and Payment—

(1) The restrictions of FAR 31.205-47(b) on allowability of costs related to legal and other proceedings also apply to any proceeding brought by a contractor employee submitting a complaint under 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal for disclosure of certain information;" and

(2) Costs incurred in connection with a proceeding that is brought by a contractor employee submitting a complaint under 10 U.S.C. 2409 are also unallowable if the result is an order to take corrective action under 10 U.S.C. 2409.

(End of clause)